

10/25/2020

Disclosed under FOI
Fwd: Fwd: Re: Service Complaint Extension of time to investigate PID (PID-No-2020-30005) [SEC=OFFICIAL]

**Subject: Fwd: Fwd: Re: Service Complaint
Extension of time to investigate PID (PID-No-
2020-30005) [SEC=OFFICIAL]**

From:

To:

----- Original Message -----

From:

[REDACTED]

To:

lisa.collett@ombudsman.gov.au

Cc:

PID@ombudsman.gov.au

Sent:

Tue, 15 Sep 2020 12:40:10 +0800

Subject:

Fwd: Re: Service Complaint Extension of time to investigate PID (PID-No-2020-30005)
[SEC=OFFICIAL]

Dear Ms Collett,

I received an out of office reply from Mr Walsh.

I explain, in my email below, why Mr Walsh has been copied into this email. It is, primarily, for reasons of visibility at the level of management. I am saddened that I feel compelled to send an email to the acting Chief Operating Officer but my correspondence with members of the Ombudsman's Public Interest Disclosure team has been less than comforting. It has, in some respects, been deeply disappointing and frustrating.

Sincerely,

P301175402J

----- Original Message -----

From:

[REDACTED]

To:

"PID" <PID@ombudsman.gov.au>

Cc:

Rodney.Walsh@ombudsman.gov.au

Sent:

Tue, 15 Sep 2020 12:28:43 +0800

Subject:

Re: Service Complaint Extension of time to investigate PID (PID-No-2020-30005) [SEC=OFFICIAL]

Dear Michael,

At 10:38:31 AEST, on Friday, 11 September 2020, I received an email from you. That email was sent from the PID@ombudsman.gov.au email mailbox. The title of that email reads 'Service Complaint Extension of time to investigate PID (PID-No-2020-30005)'. The email bore an 'Official' security classification.

The body of that email reads as follows:

Dear Anonymous

Ms Witham has asked me to look into the matters you raised as a Service Delivery complaint in your email of 9 August 2020. It may have been appropriate at that time to explain that under s 8(2) of the Ombudsman Act 1976 we will investigate in private and keep you informed of the status of our inquiries and that we expect to complete most investigations within three months. I apologise for this Office not having done so.

My investigation of the issues you raised on 9 August 2020 is close to its finish and I am awaiting some specialist information before sending the response to you. That should not take long, but I cannot provide you with an undertaking as to when the response will be ready.

Please be aware that there is no statutory obligation under the Ombudsman Act 1976 that would oblige this Office to prioritise your requirements over others, or to reply to you within set times. However, grounds of special reasons or to avoid prejudice to you would be considered if you sought priority. We would be happy to look at any request you make along those lines in the future.

Of course, it is entirely open to you to pursue this matter in other forums.

Yours sincerely

Michael | Assistant Director Public Interest Disclosure
COMMONWEALTH OMBUDSMAN
Phone: 1300 362 072
Website: ombudsman.gov.au

I will refer to the email received at 10:38:31 AEST, on Friday, 11 September 2020 as Email 1.

At 12:51:48 AEST, on Friday, 11 September 2020, I received an email from you. That email was sent from the PID@ombudsman.gov.au email mailbox. The title of that email reads 'Service Complaint Extension of time to investigate PID (PID-No-2020-30005)'. The email bore an 'Official' security classification.

The body of that email reads as follows:

Dear Anonymous

Ms Witham has asked me to look into the matters you raised as a Service Delivery complaint in your email of 9 August 2020. It may have been appropriate at that time to explain that under s 8(2) of the Ombudsman Act 1976 we will investigate in private and keep you informed of the status of our inquiries and that we expect to complete most investigations within three months. I apologise for this Office not having done so.

My investigation of the issues you raised on 9 August 2020 is close to its finish and I am awaiting some specialist information before sending the response to you. That should not take long, but I cannot provide you with an undertaking as to when the response will be ready.

Please be aware that there is no statutory obligation under the Ombudsman Act 1976 that would oblige this Office to prioritise your requirements over others, or to reply to you within set times. However, grounds of special reasons or to avoid prejudice to you would be considered if you sought priority. We would be happy to look at any request you make along those lines in the future.

Of course, it is entirely open to you to pursue this matter in other forums.

Yours sincerely

Michael | Assistant Director Public Interest Disclosure
COMMONWEALTH OMBUDSMAN
Phone: 1300 362 072
Website: ombudsman.gov.au

But for the time at which it was received, the email received at 12:51:48 AEST, on Friday, 11 September 2020 appears to be identical to Email 1. I will refer to the email received at 12:51:48 AEST, on Friday, 11 September 2020 as Email 2.

At 13:12:02 AEST, on Friday, 11 September 2020, I received an email from you. That email was sent from the PID@ombudsman.gov.au email mailbox. The title of that email reads 'Complaint to the Ombudsman 2020-100972'. The email bore an 'Unofficial' security classification.

The body of that email reads as follows:

Dear Anonymous

Ms Witham has asked me to look into the matters you raised as a Service Delivery complaint in your email of 9 August 2020. It may have been appropriate at that time to explain that under s 8(2) of the Ombudsman Act 1976 we will investigate in private and keep you informed of the status of our inquiries and that we expect to complete most investigations within three months. I apologise for this Office not having done so.

My investigation of the issues you raised on 9 August 2020 is close to its finish and I am awaiting some specialist information before sending the response to you. That should not take long, but I cannot provide you with an undertaking as to when the response will be ready.

Please be aware that there is no statutory obligation under the Ombudsman Act 1976 that would oblige this Office to prioritise your requirements over others, or to reply to you within set times. However, grounds of special reasons or to avoid prejudice to you would be considered if you sought priority. We would be happy to look at any request you make along those lines in the future.

Of course, it is entirely open to you to pursue this matter in other forums.

Yours sincerely

Michael J Assistant Director Public Interest Disclosure
COMMONWEALTH OMBUDSMAN
Phone: 1300 362 072
Website: ombudsman.gov.au

Unlike Email 1 and Email 2, the email received at 13:12:02 AEST, on Friday, 11 September 2020 has a different title. It also bears a different security classification. The body of the email received at 13:12:02 AEST, on Friday, 11 September 2020 appears to be identical to the body of Email 1 and Email 2. I will refer to the email received at 13:12:02 AEST, on Friday, 11 September 2020 as Email 3.

Your emails are almost entirely unclear. Your emails have raised more questions than answers. I'd be grateful if you could please provide me with answers to the questions I have.

1. The significance of the three emails

It is not at all clear to me why three emails were sent. Email 1 and Email 2 appear to be identical. Email 3 is different in some respects.

It is not clear with what intention you sent the third email to me. *Does Email 3 supersede Email 1 and Email 2 in the sense that no service delivery issue exists?*

Are you suggesting, through Email 3, that there is a complaint being investigated according to section 8 of the Ombudsman Act 1976 (Cth) (the Act), on the one hand, and, through Email 1 and Email 2, that there is a separate service delivery complaint being considered, on the other?

If there is a complaint being investigated according to section 8 of the Act, on the one hand, and, a separate service delivery complaint being considered, on the other, is the decision that Mr Davis provided to me on 7 August 2020 the subject of both an investigation under section 8 of the Act and a service complaint?

If there is a complaint being investigated according to section 8 of the Act, on the one hand, and, a separate service delivery complaint being considered, on the other, are you suggesting that the outcome of the service delivery complaint is tied to the investigation under section 8 of the Act and, if you are suggesting that, why is the outcome of the service delivery complaint tied to the investigation under section 8 of the Act? Are they not distinct issues (logically and jurisdictionally)?

1. 'Ms Witham has asked me to look into the matters you raised as a Service Delivery complaint in your email of 9 August 2020'

So that there is no misunderstanding, I did not raise a service delivery complaint on 9 August 2020. I made a complaint about the woeful state of Mr Davis' decision and the approach that he took when making an administrative decision. I didn't go so far as to classify the complaint. The email I sent on 9 August 2020 bore the following title:

'Re: Extension of time to investigate PID (Our Ref: PID-N-2020-30005)'.

Ms Witham, on Wednesday, 12 August 2020, sent me an email acknowledging receipt of my email of complaint dated 9 August 2020. Ms Witham's email of 12 August 2020 was sent from the PID@ombudsman.gov.au email mailbox. Her email was in response to my email of 9 August 2020. The title of that email Ms Witham sent on 12 August 2020 reads:

're: Service Complaint Extension of time to investigate PID (PID-No-2020-30005)'.

The body of Ms Witham's email of 12 August 2020 reads:

Dear discloser

Attachment to document 07

Disclosed under FOI

Fwd: Fwd: Re: Service Complaint Extension of time to investigate PID (PID-No-2020-30005) [SEC=OFFICIAL]

I am writing to acknowledge receipt of your service delivery complaint. I will look into your concern about our service delivery and get back to you in due course.

Regards

Claire

Claire Witham
Director
Public Interest Disclosure Team
COMMONWEALTH OMBUDSMAN

Email: pid@ombudsman.gov.au

The record demonstrates that Ms Witham decided to construe my email of 9 August 2020 as a service delivery complaint. That was a reasonable interpretation because, as I understand the concept of reviews undertaken by officials to the Office of the Commonwealth Ombudsman, it would not have been open to Ms Witham to review Mr Davis' decision, which was made under the *Public Interest Disclosure Act 2013* (Cth).

Importantly, Ms Witham did not characterise the complaint that I made as one that would be investigated under section 8 of the Act. It was simply characterised as a service complaint.

It is also not clear, in your emails of 11 September 2020, when it was that Ms Witham asked you to 'look into the matters that [I] raised as a service delivery complaint in [my] email of 9 August 2020'. *When did Ms Witham ask you to 'look into the matters that [I] raised as a service delivery complaint in [my] email of 9 August 2020' and are you suggesting that it would have been appropriate at the time that Ms Witham asked you to 'look into the matters that [I] raised as a service delivery complaint in [my] email of 9 August 2020' for you or Ms Witham to notify me that an investigation under section 8 of the Act was underway?*

1. It may have been appropriate at that time to explain that under s 8(2) of the Ombudsman Act 1976 we will investigate in private and keep you informed of the status of our inquiries and that we expect to complete most investigations within three months

As is intimated in your emails of 11 September 2020, this is the first time that any references to the fact that an investigation is being conducted under the Act have been disclosed to me.

3.1 'At that time'

In Email 1, Email 2 and Email 3, you state:

It may have been appropriate at that time to explain that under s 8(2) of the Ombudsman Act 1976 we will investigate in private and keep you informed of the status of our inquiries and that we expect to complete most investigations within three months.

My question to you is, at what time? It is not clear what time you are referring to.

There are only three possible times at which Ms Witham could have possibly explained 'that under s 8(2) of the Ombudsman Act 1976 we will investigate in private and keep you informed of the status of our inquiries and that we expect to complete most investigations within three months.'

The first would have been on 12 August, when Ms Witham acknowledged receipt of my email.

The second would have been on 18 August 2020. In her email of 18 August 2020, Ms Witham stated:

Dear discloser

I will be looking into your service complaint relating to our office granting an extension to the agency handling your PID (APSC). I will be considering the extent to which we followed our processes in this regard and looking for any areas for service improvement. I will endeavour to complete this review in the next two to three weeks and will get back to you with any outcomes.

I note your email indicates you have concerns about how your PID is being handled by the APSC. It is open to you to make a complaint to our office about the agency's handling of your PID. In such a case we will look at the agency's handling of the PID and whether its actions were lawful and reasonable in all of the circumstances. We would not reinvestigate the allegations you made in your PID.

Regards

Claire

Director
Public Interest Disclosure Team
COMMONWEALTH OMBUDSMAN

Email: pid@ombudsman.gov.au

The third possible time that Ms Witham could have mentioned that an investigation was being conducted under the Act would have been on 9 September 2020. In her email to me, dated 9 September 2020, Ms Witham stated:

Dear discloser

I write to acknowledge receipt of your emails dated 9 September 2020 addressed to myself and Mr Scott Davis regarding your service complaint. I note that I did not indicate a specific date for my response to your complaint, nor did I agree to the 8 September 2020 deadline which you stipulated. I want to assure you that we are considering your service complaint about our Office's decision to grant an extension to the APSC in relation to your PID and that every effort is being made to resolve this matter as quickly as possible.

I ask that any future emails be addressed to me and not Mr Davis. I also note that in your email to Mr Davis you are seeking a statement from this Office pursuant to subsection 13(1) of the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act). Please be advised I am seeking advice in relation to your request and this may take two to three weeks

Regards

Claire

Claire Witham
Director
Public Interest Disclosure and Major Investigations
COMMONWEALTH OMBUDSMAN

Email: pid@ombudsman.gov.au

3.1.1 Ms Witham should have explained, on 12 August 2020, that an investigation was being conducted under the Act

Are you suggesting that, at the time that Ms Witham acknowledged receipt, on 12 August 2020, of my email of complaint, Ms Witham should have explained that the service delivery complaint would be investigated as a complaint under the Act?

I don't profess to be an expert on the Act or the processes of the Office of the Commonwealth Ombudsman, but I have had an opportunity to peruse the Act and the *Commonwealth Ombudsman Work Practices Manual for complaint management (the Manual)* issued in January 2019.

Having skimmed chapter 4 of the Manual, it appears to me that there is a clear distinction drawn between a service delivery complaint and complaint made under the Act. I don't quite understand how it we be the case that Ms Witham would have formed the view that my complaint constituted both a service delivery complaint and a complaint that required investigation under the Act.

In saying that 'it may have been appropriate at that time to explain that under s 8(2) of the Ombudsman Act 1976 we will investigate in private and keep you informed of the status of our inquiries and that we expect to complete most investigations within three months', are you suggesting that, in this instance, Ms Witham had decided by 12 August 2020 that the complaint about Mr Davis was also a complaint under the Act and that she had decided to investigate because the complaint was about action, being action that relates to a matter of administration by a prescribed authority, in respect of which a complaint has been made to the Ombudsman for the purposes of the Act?

If you are suggesting that Ms Witham had decided by 12 August 2020 that the complaint about Mr Davis was a complaint under the Act and that she had decided to investigate because the complaint was about action, being action that relates to a matter of administration by a prescribed authority, in respect of which a complaint has been made to the Ombudsman for the purposes of the Act, then, according to part 2.2 of the Manual, Ms Witham would have considered the complaint, logged the complaint as, at least, a Category 2 complaint in your Office's case management system, *Resolve*, and prepared an investigation plan in order to escalate the complaint from Category 2 to Category 3, the relevant Category under which an investigation under section 8 of the Act takes place.

That doesn't strike me as plausible. The timing doesn't add up.

Also, *why would Ms Witham only refer to a service delivery complaint in the body of her email of 12 August 2020 and the title of her email?*

3.1.2 Ms Witham should have explained, on 18 August 2020, that an investigation was being conducted under the Act

Are you suggesting that, at the time that Ms Witham wrote to me on 18 August 2020 and undertook to endeavour to complete her review into the extent to which Mr Davis followed processes in respect of granting an extension to the agency handling my public interest disclosure, and to '[look] for any areas for service improvement', Ms Witham should have explained that the service delivery complaint would be investigated as a complaint under the Act?

Perhaps she should have, but it is clear that Ms Witham did not think that the complaint that I made on 9 August 2020 was a complaint made for the purposes of investigation under the Act. Ms Witham's email of 18 August 2020 betrays her state of mind on the characterisation of the complaint I made on 9 August 2020. Ms Witham is at pains to look into the complaint I made on 9 August 2020 to identify areas of service improvement. That does not sound to me like Ms Witham has construed the complaint of 9 August 2020 as a complaint made under the Act about action, being action that relates to a matter of administration by a prescribed authority, in respect of which a complaint has been made to the Ombudsman for the purposes of the Act.

To press the point that she had construed the complaint that I had made on 9 August 2020 as a service delivery complaint (and only a service delivery complaint), Ms Witham went on to say, in her email of 18 August 2020:

I note your email indicates you have concerns about how your PID is being handled by the APSC. It is open to you to make a complaint to our office about the agency's handling of your PID in

Fwd: Fwd: Re: Service Complaint Extension of time to investigate PID (PID-No-2020-30005) [SEC=OFFICIAL]

such a case we will look at the agency's handling of the PID and whether its actions were lawful and reasonable in all of the circumstances. We would not reinvestigate the allegations you made in your PID.

Ms Witham unmistakably invites me to make a complaint about another agency, namely the APSC, and how the APSC is handling my public interest disclosure. If Ms Witham had concluded that the complaint of 9 August 2020 was a complaint made under the Act about action, being action that relates to a matter of administration by a prescribed authority, in respect of which a complaint has been made to the Ombudsman for the purposes of the Act, Ms Witham would not have invited me to make a complaint about the way in which the APSC, a prescribed authority, was handling my public interest disclosure. In any event, I had specifically noted in my email of 9 August 2020 that:

[w]hile I may end up formally complaining about the way the APSC has handled my disclosure at the end of the investigation process, I want to lodge a complaint about the way you have handled the APSC's request for an extension of time.

Clearly, my complaint was not yet one about another agency, Department or prescribed authority.

Ms Witham had not construed my complaint of 9 August 2020 as a complaint made for investigation under the Act by 18 August 2020. The implication of that statement is that because Ms Witham had not, by 18 August 2020, construed my complaint of 9 August 2020 as a complaint made for investigation under section 8 of the Act, she had, necessarily, not construed my complaint of 9 August 2020 as a complaint made for investigation under section 8 of the Act when she acknowledged my complaint on 12 August 2020.

3.1.3 Ms Witham should have explained, on 9 September 2020, that an investigation was being conducted under the Act

It seems to me to be very clear, based on what I have recorded in parts 3.1.1 and 3.1.2 that, when she wrote to me on 12 August 2020 and 18 August 2020, Ms Witham was of the view that the complaint that I had made in my email of 9 August 2020 was not anything other than a service delivery complaint. In other words, Ms Witham was not of the view that my complaint, of 9 August 2020, about the record of decision Mr Davis provided to me on 7 August 2020, and the approach that he took when making the administrative decision to grant an extension of time to the APSC to investigate my public interest disclosure, was a complaint about Mr Davis' action, being action that relates to a matter of administration by a prescribed authority, in respect of which a complaint has been made to the Ombudsman for the purposes of the Act.

The only other time Ms Witham wrote to me was on 9 September 2020. The title of Ms Witham's email of 9 September 2020 reads:

'Service Complaint Extension of time to investigate PID (PID-No-2020-30005)'.

Throughout the email of 9 September 2020, Ms Witham is at pains to refer to the complaint as a 'service complaint'. It does not seem to me that Ms Witham thinks that the complaint I made on 9 August 2020 is anything other than a service delivery complaint.

I struggle to understand what you mean when you say 'it may have been appropriate at that time to explain that under s 8(2) of the Ombudsman Act 1976 we will investigate in private and keep you informed of the status of our inquiries and that we expect to complete most investigations within three months', especially because it is demonstrably the case that Ms Witham was, at least until 18 August 2020, not of the view that the complaint I made on 9 August 2020 was anything other than a service delivery complaint. Ms Witham's emails all suggest that she had construed my email of 9 August 2020 to be a service delivery complaint.

Are you suggesting that the Director of Public Interest Disclosure Team doesn't know what she is talking about? I'd hate to think that is the case.

3.1.4 Preliminary inferences and other comments

The first reference to a complaint being investigated pursuant to section 8 of the Act is, at least from my point of view, suspiciously timed. You'll forgive me for harbouring such opinions but given how poorly things have been managed by the Office of the Commonwealth Ombudsman, and the prospects of public scrutiny of the actions of staff members in the Office of the Commonwealth Ombudsman stemming from a possible judicial review application, it is not outside the realm of possibility that your claim that the complaint I made on 9 August 2020 is being investigated under section 8 of the Act is an attempt to save face.

Firstly, as I've already noted, you have not at all been clear as to when Ms Witham, or someone else, decided to investigate my complaint of 9 August 2020 as a complaint under the Act.

Secondly, claiming that the complaint is being investigated (in the sense of the complaint being a Category 3 complaint) allows you to, conveniently, manoeuvre around the issue of Ms Witham's undertaking to 'endeavour to complete [her] review' of my complaint of 9 August 2020 between 1 September 2020 and 8 September 2020 because you can state that Category 3 complaints, ordinarily, require three months to consider. Of course, I find it hard to believe that Ms Witham would have committed to 'endeavour to complete [her] review' of my complaint of 9 August 2020 between 1 September 2020 and 8 September 2020 if she genuinely was of the view that the complaint she was dealing with was a complaint made under the Act. It seems to me that Ms Witham made her undertaking because she believed that the complaint was a service delivery complaint, which, according to part 4.1 of the Manual, the Office of the Commonwealth Ombudsman seeks to resolve in two weeks. It appears that Ms Witham gave herself a buffer, probably relying on my request to substantively respond to my complaint in 30 days, and having failed to meet the 8 September 2020 deadline, chose to claim, in poor form, that she had not indicated that she would respond to my complaint by a specific date.

Fortunately, you can clarify your unclear emails of 11 September 2020 and assist me in understanding what it is you are suggesting in your emails.

As I understand the Manual, whenever a complaint is made to the Office of the Commonwealth Ombudsman, a record must be made in *Resolve*, the case management system used at the Office of the Commonwealth Ombudsman.

You should have no problem in interrogating *Resolve* in order to answer the following questions.

1. When was the first entry made in *Resolve* in respect of the complaint I made in my email of 9 August 2020?
2. Did that first entry identify the 'Commonwealth Ombudsman' as the agency and 'Service Delivery' as the subject or did that first entry record an 'approach' (in the sense of that word in part 2.2 of the Manual)? If neither an 'approach' or 'Service Delivery' were recorded, what was recorded in the first entry made in respect of the complaint in my email of 9 August 2020.
3. If the first record in *Resolve* was not on 'approach', at what point was the complaint that I made on 9 August 2020 formally classified as an 'approach'?
4. Given that you are conducting an investigation under section 8 of the Act and that you have indicated that the average processing time for such investigations is between 2 and 3 months, I have, based on information I have gleaned from the Manual concluded that you are dealing with a Category 3 approach. Can you please confirm whether you are dealing with a Category 3 approach? If you are not, can you please note what sort of 'approach' you are dealing with (if you are, in fact, dealing with an 'approach')?
5. According to part 2.2 of the Manual, 'escalation from category 2 to 3 requires the preparation of an investigation plan'. When was the investigation plan about the state of Mr Davis' decision of 7 August 2020, and the approach that he took when making an administrative decision, prepared?

By answering these questions, you can clarify your unclear emails of 11 September 2020. You can give objective reference to the indeterminate reference 'at that time'. I would appreciate candid and truthful answers to the questions I have posed. I note that if you skirt around the questions, refuse to answer them or ignore my email, I will make a freedom of information request for the entries in *Resolve* in due course. I hope it does not come to that.

3.2 Who or what is being investigated under section 8 of the Act?

Throughout part 3.1 of this email, I have assumed that my complaint about the state of Mr Davis' decision of 7 August 2020, and the approach that he took when making an administrative decision, is what is being investigated pursuant to section 8 of the Act. That, of course, has not been explicitly noted in your emails of 11 September 2020, which is yet another reason why your emails are unclear. Of course my assumption may be unfounded. My assumption presupposes that, in order for you to investigate the state of Mr Davis' decision of 7 August 2020, and the approach that he took when making an administrative decision, pursuant to section 8 of the Act, the Commonwealth Ombudsman would have jurisdiction to investigate complaints about members of his own staff pursuant to section 8 of the Act. Perhaps I've assumed too much.

In your emails of 11 September 2020, you state:

It may have been appropriate at that time to explain that under s 8(2) of the Ombudsman Act 1976 we will investigate in private and keep you informed of the status of our inquiries and that we expect to complete most investigations within three months.

When you say 'we' in the context of 'we will investigate in private and keep you informed of the state of our inquiries', who are you referring to?

When you say 'we will investigate' in the context of 'we will investigate in private and keep you informed of the state of our inquiries', what will you investigate?

It's not in the least explicit what you are referring to and I can only try my best, on the basis of reasonable assumptions, to make sense of your unclear emails.

If I have assumed too much and the investigation under section 8 of the Act is not an investigation into the state of Mr Davis' decision of 7 August 2020, and the approach that he took when making an administrative decision, then that begs the question *who, or what, is being investigated under section 8 of the Act?*

The only other Department or prescribed authority that is referred to in my email of 9 August 2020 is the APSC. I suppose it might be possible that an investigation under section 8 of the Act is being carried out in respect of actions taken by the APSC. Of course, if this is the case, there are further issues that require clarification.

3.2.1 How has the Commonwealth Ombudsman's jurisdiction to investigate been enlivened?

I have already admitted to not being an expert on the operation of the Act but, as I understand the Act, it would appear that either:

- the Ombudsman shall investigate action, being action that relates to a matter of administration, taken either before or after the commencement of this Act by a Department, or by a prescribed authority, and in respect of which a complaint has been made to the Ombudsman (paragraph 5(1)(a) of the Act); and

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- the Ombudsman may, of his or her own motion, investigate any action, being action that relates to a matter of administration, taken either before or after the commencement of this Act by a Department or by a prescribed authority (paragraph 5(1)(b) of the Act); and
- the Ombudsman with the consent of the Minister, may enter into an arrangement under which the Ombudsman will perform functions of an ombudsman under an ombudsman scheme established in accordance with the conditions of licences or authorities granted under an enactment (paragraph 5(1)(c) of the Act).

Plainly, I have not made a complaint to the Ombudsman about the APSC, so it would not be possible to rely on paragraph 5(1)(a) of the Act to enliven jurisdiction. Paragraph 5(1)(c) seems not to apply to the current situation. The only other ground upon which reliance can be placed to invoke jurisdiction, at least in as much as I can tell, is paragraph 5(1)(b). But if paragraph 5(1)(b) is being relied on, then you would not be investigating action in relation to a matter of administration in respect of which a complaint has been made under section 8; you would be investigating action that relates to a matter of administration of your own motion. It would, thus, be somewhat misleading to suggest that it would have been appropriate for Ms Witham (or someone at the Office of the Commonwealth Ombudsman) to 'explain that under s 8(2) of the Ombudsman Act 1976 [the Commonwealth Ombudsman] will investigate in private and keep you informed of the status of [his or her] inquiries ...' because Ms Witham was responding to a *complaint* I had made.

I hope you weren't deliberately trying to mislead me.

Can you explain to me on what basis you are investigating whatever it is that you are investigating under section 8 of the Act? In other words, how has the jurisdiction of the Ombudsman been enlivened to conduct an investigation under section 8 of the Act?

3.2.2 If the action of a Department or prescribed entity is being investigated, the principal officer of that Department or prescribed entity must have been informed

As I have already mentioned, given that the first reference to a complaint being investigated pursuant to section 8 of the Act was made only after I took issue with Ms Witham's email on 9 September 2020, at least from my point of view, the reference to the section 8 investigation is suspiciously timed. Fortunately, you can considerably assuage my suspicions by truthfully, candidly and clearly answering the question that follows in part 3.2.2.

It seems that, if the action that is being investigated is action of a Department or prescribed entity that is not the Office of the Commonwealth Ombudsman, the principal officer of the relevant Department or prescribed entity should have been informed. In other words, if the investigation commenced under section 8 of the Act is not an investigation into the state of Mr Davis' decision of 7 August 2020, and the approach that he took when making an administrative decision, and is, rather, an investigation into action, being action that relates to a matter of administration, taken by a Department or a prescribed authority other than the Office of the Commonwealth Ombudsman, then it would follow that the principal officer of that Department or prescribed authority would have been informed that the action is to be investigated (subsection 8(1) of the Act). It also seems, according to the part 2.2 of the Manual, that 'an investigation commences at the point at which [the Office of the Commonwealth Ombudsman] contacts an agency'. Given that you have stated, in your emails of 11 September 2020, that '[your] investigation of the issues [I] raised on 9 August 2020 is close to its finish', I think it should be reasonable for me to assume that, if the investigation under section 8 of the Act is an investigation into action taken by a Department or a prescribed authority other than the Office of the Commonwealth Ombudsman, the principal officer of the Department or prescribed authority was contacted some time ago.

Assuming the investigation under section 8 of the Act is an investigation into action taken by a Department or a prescribed authority other than the Office of the Commonwealth Ombudsman, can you please confirm the date on which the principal officer of the relevant Department or prescribed authority was notified of the investigation into the action being investigated?

3.2.3 If the action, being an action that relates to a matter of administration, that is being investigated is not about the state of Mr Davis' decision of 7 August 2020, and the approach that he took when making an administrative decision, what has happened to the complaint I made about the state of Mr Davis' decision of 7 August 2020, and the approach that he took when making an administrative decision?

If the action, being an action that relates to a matter of administration, that is being investigated is not about the state of Mr Davis' decision of 7 August 2020, and the approach that he took when making an administrative decision, what has happened to the complaint I made about the state of Mr Davis' decision of 7 August 2020, and the approach that he took when making an administrative decision?

In your emails of 11 September 2020, you stated:

Ms Witham has asked me to look into the matters you raised as a Service Delivery complaint in your email of 9 August 2020. It may have been appropriate at that time to explain that under s 8(2) of the Ombudsman Act 1976 we will investigate in private and keep you informed of the status of our inquiries and that we expect to complete most investigations within three months. I apologise for this Office not having done so.

My investigation of the issues you raised on 9 August 2020 is close to its finish and I am awaiting some specialist information before sending the response to you. That should not take long, but I cannot provide you with an undertaking as to when the response will be ready.

Since you have held out that Ms Witham 'asked [you] to look into the matters that [I] raised as a ... complaint in [my] email of 9 August 2020' and that, '[i]t may have been appropriate at that time to explain that under s 8(2) of the Ombudsman Act 1976 [you or the Office of the Commonwealth Ombudsman] will investigate' I have, I think reasonably, assumed that what is being investigated is what I have raised in my email of 9 August 2020, which contained a complaint about the state of Mr Davis' decision of 7 August 2020, and the approach that he took when making an administrative decision. You will recall that, in the opening paragraphs of my email of 9 August 2020, I stated:

While I may end up formally complaining about the way the APSC has handled my disclosure at the end of the investigation process, I want to lodge a complaint about the way you have handled the APSC's request for an extension of time. To that end, please pass this email of complaint to your supervisor, or the most appropriate officer, for consideration and response.

Clearly, my complaint was about the state of Mr Davis' decision of 7 August 2020, and the approach that he took when making an administrative decision.

If it turns out that the investigation pursuant to section 8 of the Act is in respect of action, being an action that relates to a matter of administration, that someone other than Mr Davis has taken, it would beg the question, what has happened to the complaint made about Mr Davis on 9 August 2020 that Ms Witham characterised as a service delivery complaint?

Is that service delivery complaint being considered separately? If so, what of your intimations that you have been investigating the complaint I raised about Mr Davis' record of decision, and the approach he took when making an administrative decision, in my email of 9 August 2020, under section 8 of the Act? After all, the context in which you wrote to me was in response to my queries to Ms Witham about her failure to respond to the service delivery complaint after more than 30 days. You will recall that, according to part 4.1 of the Manual, Ms Witham ought to have aimed to substantively respond to my complaint of 9 August 2020 in 14 days. To conflate the consideration of the service delivery complaint with the investigation you are carrying out under section 8 of the Act would be misleading. To conflate the consideration of the service delivery complaint with the investigation you are carrying out under section 8 of the Act to justify a three month 'turn-around' on the complaint I made on 9 August 2020 in circumstances where Ms Witham had undertaken to endeavour to complete her review into a service delivery complaint between 1 September and 8 September 2020 (well beyond the 14 day aim set out in part 4.1 of the Manual) would be more than misleading; it would be deceptive. It would be deceptive because you would be using the pretext of an investigation under section 8 of the Act into the action, being action that relates to a matter of administration, of another agency to cover for Ms Witham's failure to respond to a complaint Ms Witham characterised as a service delivery complaint about Mr Davis' record of decision, and the approach that he took when making an administrative decision.

1. Concluding remarks

Because it is not at all clear whether my complaint about Mr Davis' record of decision, and the approach that he took when making an administrative decision, is still being considered as a service delivery complaint (see the titles to Email 1 and Email 2), I have had to entertain the possibility that I am being given the run around.

Because it is not at all clear if and or when my complaint about Mr Davis' record of decision, and the approach that he took when making an administrative decision, was first considered for investigation pursuant to section 8 of the Act, I have had to entertain the possibility that I am being given the run around.

Because it is not at all clear whether the action being investigated is, in fact, about Mr Davis' record of decision, and the approach that he took when making an administrative decision, I have had to entertain the possibility that I am being given the run around.

Because you have failed to clearly explain what action, being either the action of Mr Davis or the action of the APSC (or Ms McMullan of the APSC), is being investigated under section 8 of the Act, I have had to entertain the possibility that I am being given the run around.

Because you have failed to explain at what time Ms Witham should have explained to me that an investigation into the complaint I made on 9 August 2020 has been the subject of an investigation under section 8 of the Act, I have had to entertain the possibility that I am being given the run around.

Because all this talk about an investigation under section 8 of the Act, from my perspective, rather suspiciously, followed hot on the heels of:

- my email of 11 September 2020, in which I picked apart Ms Witham's claim that she did not agree to respond to my complaint of 9 August 2020, which she characterised as a service delivery complaint, by Tuesday, 8 September 2020; and
- my email to Mr Davis seeking reasons under subsection 13(1) of the ADJR Act for the decision he rendered on 7 August 2020,

you can appreciate, in the light of the utter lack of clarity associated with your emails of 11 September 2020, how I have entertained the notion that talk of an investigation under section 8 of the Act is a face saving exercise, an attempt to redirect attention from Ms Witham's failure to respond to my complaint by 8 September 2020 and a cynical attempt to absolve the Office of the Commonwealth Ombudsman of responsibility for its less than impressive record in dealing with the issues raised in my email complaint on 9 August 2020.

Disclosed under FOI

Fwd: Fwd: Re: Service Complaint Extension of time to investigate PID (PID-No-2020-30005) [SEC=OFFICIAL]

At root, the reason why I have had to prepare this email is because your emails of 11 September 2020 are not at all clear for the reasons I have set out in the body of this email.

I request that you acknowledge receipt of this email as soon as possible and no later than 10:00 AEST on Friday, 18 September 2020. I request that you respond to the questions posed, clearly, unambiguously and, in as much as you are capable, without vagueness, as soon as possible and, in any event, no later than 17:00 AEST on Thursday, 24 September 2020.

I do not think it is too much to ask what action is being investigated under section 8 of the Act. It should, at the very least, know what is being investigated.

I do not think it is too much to ask whether what is being investigated responds to my complaint, or uses my complaint as a point of departure to investigate the conduct of another agency and leaves my complaint, which has been characterised as a service complaint, unanswered until the investigation is complete so that the Office of the Commonwealth Ombudsman can save face.

I do not think it is too much to ask what the significance of sending three identically worded emails on the same day, with one of those emails bearing another title and security classification, is. It seems like something a reasonable person would want to know.

I do not think it is too much to ask for answers to these questions by Thursday, 24 September 2020 particularly because you have apologised and, I assume acknowledged, that this basic information should have been provided to me 'at that time' that Ms Witham should have notified me about the investigation under section 8 of the Act. Whatever 'at that time' means, it does not mean a time after the emails you sent on 11 September 2020. Accordingly, it is entirely reasonable for me to request information that should have been provided to me well before 11 September 2020 by 24 September 2020.

I very sincerely hope that you can allay my concerns and assuage my suspicions with your candid and truthful responses to the questions that I have raised in this email. For your convenience, the questions have been coloured in red text and are in bold and italicised font. While I am hopeful that my deep and, in my opinion, warranted concerns, stemming from your failure to clearly explain what is being investigated pursuant to section 8 of the Act in your emails of 11 September 2020, can all be explained away, I would be a fool to think that it was not possible for you to give me the run around. I do not want it to be said by members of the management of the Office of the Commonwealth Ombudsman that they were unaware of the issues stemming from my complaint about Mr Davis' record of decision and the prospects of an application for judicial review (and, among possible remedies, declaratory relief). For that reason, I have copied Mr Rodney Lee Walsh, the Senior Executive Service officer responsible for the administration of the Public Interest Disclosure Scheme in the Office of the Commonwealth Ombudsman, into this email.

Sincerely

P301175402J

----- Original Message -----

From:

"PID" <PID@ombudsman.gov.au>

To:

[REDACTED]

Cc:

Sent:

Fri, 11 Sep 2020 00:38:31 +0000

Subject:

Service Complaint Extension of time to investigate PID (PID-No-2020-30005) [SEC=OFFICIAL]

OFFICIAL

Dear Anonymous

Ms Witham has asked me to look into the matters you raised as a Service Delivery complaint in your email of 9 August 2020. It may have been appropriate at that time to explain that under s 8(2) of the *Ombudsman*

Act 1976 we will investigate in private and keep you informed of the status of our inquiries and that we expect to complete most investigations within three months. I apologise for this Office not having done so.

My investigation of the issues you raised on 9 August 2020 is close to its finish and I am awaiting some specialist information before sending the response to you. That should not take long, but I cannot provide you with an undertaking as to when the response will be ready.

Please be aware that there is no statutory obligation under the *Ombudsman Act 1976* that would oblige this Office to prioritise your requirements over others, or to reply to you within set times. However, grounds of special reasons or to avoid prejudice to you would be considered if you sought priority. We would be happy to look at any request you make along those lines in the future.

Of course, it is entirely open to you to pursue this matter in other forums.

Yours sincerely

Michael | Assistant Director Public Interest Disclosure

COMMONWEALTH OMBUDSMAN

Phone: 1300 362 072

Website: ombudsman.gov.au

Influencing systemic improvement in public administration

The Office of the Commonwealth Ombudsman acknowledges the traditional owners of country throughout Australia and their continuing connection to land, culture and community. We pay our respects to elders past and present.

COMMONWEALTH OMBUDSMAN - IMPORTANT
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